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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CHARLES E. STARR and SOPHIE STARR, his wife,

Petitioners,

v.

JOHN A. PRING, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the court of appeals failed to give full effect to Department of Transportation regulations on airworthiness of aircraft, promulgated pursuant to 49 U.S.C. § 1348, in violation of the Commerce Clause, art. I, § 8, cl. 3, and the Supremacy Clause, art. VI, cl. 2, of the United States Constitution?

2. Whether the decision of the court of appeals that no failure of consideration occurred under the terms of the airplane lease contract executed by the parties was based upon an incorrect interpretation of Idaho state contract law?

3. Whether the court of appeals applied Fed. R. Civ. P. 52(a), specifically, that findings of fact shall not be set aside unless clearly erroneous, to the ultimate issue before it for decision, thereby violating the interpretation given to the "clearly

erroneous rule" by the federal courts?

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JOHN A. PRING, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

December 8, 1978, Judgment
in favor of the Plaintiff
entered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

December 12, 1980, Judgment of
district court affirmed.

OPINIONS BELOW

The opinion below by the Circuit Court of Appeals for the Ninth Circuit is an unpublished memorandum decision. A copy of the opinion is set out in full as Appendix A. The opinion below by the District Court for the District of Idaho is also an unpublished opinion read in open court.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 1980. This petition for certiorari was filed within ninety days of that date. 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

U.S. Const. art. I, § 8, cl. 3

> The Congress shall have Power . . . [3] To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes . . . .

U.S. Const. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1332(a)(1)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States . . . .

28 U.S.C. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

49 U.S.C. § 1348(a)

The Secretary of Transportation is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required

in the public interest.

Fed. R. Civ. P. 52(a)

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

14 C.F.R. § 91.3(a)

> The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

14 C.F.R. § 91.29

> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

STATEMENT OF THE CASE

On or about July 24, 1975, the petitioners and the respondent entered into an agreement in which the respondent agreed to lease a 7-place Cessna twin-engine aircraft to the petitioners in consideration for monthly rental payments of a minimum of $1,900.00. No difficulties occurred in this arrangement until late September and early October of 1975 when the petitioners observed structural problems with the aircraft. The

respondent had the airplane repaired shortly thereafter and returned it to the petitioners. No further problems were encountered until the spring of 1976 when structural problems were again discovered. At this time, petitioner-pilot Charles Starr discovered structural difficulties of such magnitude that, in his judgment, the aircraft was not airworthy. Because of the aircraft's condition, the petitioners were forced to take it out of service on June 6, 1976. At this time, the petitioners refused to make further payments under the lease. The aircraft was eventually repossessed by the respondent and leased to another aircraft operator.

The respondent thereupon brought an action for damages against the petitioners for rent due under the lease contract and for additional expenses incurred. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1332(a)(1), as the petitioners and the respondent are citizens

of different states, and the amount in controversy was over $10,000.00. The District Court ruled in favor of the respondent. It made the following findings, produced in relevant part, which it labelled Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

* * *

9. In January or February 1976, defendants began the proposed non-scheduled air service from Coeur d'Alene, Idaho, to Boise, Idaho, using the Cessna. After approximately three weeks of trial runs and unscheduled activity it was abandoned for the reason that it proved to be economically unfeasible.

10. By about the month of May 1976, it was evident to the defendants that they were unable to obtain sufficient income from the use of the Cessna aircraft to meet the $1,900.00 per month minimum lease payments. They ceased making the payments for this reason.

* * *

12. Defendants claim, and defendant Charles E. Starr testified, that the reason for the termination of the Lease Contract by the defendants was the problem

> with the rivets which he claimed was never properly cured. I find from the evidence that the alleged dangerous condition caused by loose rivets was not the reason for the termination of the lease payments by the defendants.
>
> CONCLUSIONS OF LAW
>
> * * *
>
> 3. That the defendants without legal cause breached the said Contract and refused to pay the lease payments except that the defendants paid the sum of $19,000.00.
>
> * * *
>
> 6. That in order to preserve the Cessna and carry out his duty to mitigate damages, plaintiff advanced the sum of $4,027.46, all as set out in the Findings of Fact.
>
> 7. That the plaintiff is entitled to damages against the defendants for a sum equal to the unpaid lease payments, together with the expenses necessarily advanced and less rentals received and to be received from the second lessee.

The petitioners appealed the judgment of the district court to the Court of Appeals for the Ninth Circuit. The petitioners raised the three grounds which are asserted

herein in support of their argument for reversal. On December 12, 1980, the judgment of the district court was affirmed.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS FAILED TO GIVE FULL EFFECT TO DEPARTMENT OF TRANSPORTATION REGULATIONS ON AIRWORTHINESS OF AIRCRAFT, PROMULGATED PURSUANT TO 49 U.S.C. § 1348, IN VIOLATION OF THE COMMERCE CLAUSE, ART. I, § 8, CL. 3, AND THE SUPREMACY CLAUSE, ART. VI, CL. 2, OF THE UNITED STATES CONSTITUTION.

In their brief before the court of appeals, the petitioners placed emphasis on the Department of Transportation regulations (hereinafter referred to as Federal Aviation Administration regulations) codified at 14 C.F.R. §§ 91.3(a) and 91.29. The relevant language of these regulations, promulgated pursuant to 49 U.S.C. § 1348, is as follows:

> The pilot in command of an aircraft is directly responsible for, and is the final authority as to,

the operation of that aircraft.

14 C.F.R. § 91.3(a).

> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

14 C.F.R. § 91.29(a),(b).

The petitioners submitted that according to the authority of the aircraft pilot under these sections, the pilot's determination of lack of airworthiness should have excused their failure to pay rent under the lease contract. The court of appeals, however, completely disregarded these regulations in its decision to affirm the district court's judgment in favor of the respondent. No mention of the regulations is included in the court of appeals' opinion. The petitioners respectfully contend that the court of appeals' failure to give these regulations their

full effect requires reversal of its decision.

When Congress passed the Federal Aviation Act, the statute pursuant to which the above regulations were promulgated, the Congress made it clear that the Federal Aviation Administration was being given a broad power to adopt much needed air safety regulations.

> The most careful consideration must be given in the drafting of these [FAA] regulations. An understanding of the system sought to be achieved and a knowledge of the problems faced at the operations level are necessary if the regulations are to accomplish their purpose. Once promulgated, the regulations must be applied and enforced, and if need be, modified or repealed to meet changing conditions. Rulemaking processes should not lag far behind advances in equipment and techniques.
>
> . . . .
>
> How to insure the maximum possible safety and efficiency under proper regulations, impartially enforced, is one of the major problems in connection with this legislation.

H.R. Rep. No. 2360, 85th Cong., 2d Sess.,

reprinted in [1958] U.S. Code Cong. & Ad. News 3741, 3747.

This Honorable Court has recognized the broad power of the Federal Aviation Administration. This broad statutory grant was recognized in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), where this Honorable Court held that the Federal Aviation Administration's broad power to regulate airspace preempted a city ordinance on airplane noise. Preemption was held to have occurred because of Congress' broad power to legislate in this area pursuant to the Commerce and Supremacy Clauses of the United States Constitution. This Court so held even in light of the traditionally broad police power of the states in the area of noise regulation. The federal interest in controlling air commerce was held to be so great as to require conflicting state regulations to yield to federal authority.

Lower courts have also analyzed the extensive powers of the Federal Aviation

Administration. The decision in United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1973), appeal dismissed sub nom. Town of East Haven v. United States, 419 U.S. 958 (1974), is illustrative. There, the City of New Haven had extended an airport runway in violation of state law. The city was sued in state court, and the court enjoined New Haven from using the extended runway. The decision was eventually affirmed by the Connecticut Supreme Court. The City of New Haven continued to use the extended runway despite the adverse state court determination, and was, as a result, cited for contempt. The United States then intervened and applied, in federal court, for an injunction against the enforcement of the state court orders. The district court enjoined the enforcement of the state court orders and the injunction was affirmed on appeal.

The Second Circuit Court of Appeals began by noting that the Federal Aviation

Administration has been given extensive power to regulate air commerce. 496 F.2d at 454. It then observed that the runway extensions were specifically governed by federal regulations on "clear zones." The state court decisions, since they conflicted with the federal regulations, were held to be preempted.

> The clear zones, as part of the navigable airspace, are subject to federal regulation, and the orders of the Connecticut courts infringed upon the federal power. Chief Judge Blumenfeld wrote:
>
> > Thus, the order of the New Haven Superior Court was directed to and conflicted squarely with the regulation of navigable airspace which Congress has reserved for exclusive federal control. To the extent that it prevents aircraft from using navigable airspace it is unenforceable under the supremacy clause and may properly be enjoined by a federal court, despite the broad sweep of the anti-injunction statute, 28 U.S.C. § 2283. 367 F. Supp. 1338 at 1341.

Id. Even though there had been a violation of state law, the state court decisions were of no effect because of the overriding federal interest in regulating navigable airspace. See also British Airways v. Port Authority of New York and New Jersey, 431 F. Supp. 1216 (S.D.N.Y.), modified on other grounds, 564 F.2d 1002 (2d Cir. 1977).

When the regulations specifically at issue in the petitioners' case have been discussed in the lower courts, they have been given very broad effect. In a number of decisions, the lower courts have strongly stressed that the aircraft pilot is the ultimate arbiter of airworthiness. For example, despite the negligence of other persons contributing to the crash of an airplane, the responsibility of the pilot to determine that the aircraft is in a safe condition for flight has barred tort actions in many cases. See Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1066 (1978); Bandy

v. United States, 492 F. Supp. 13 (W.D. Tenn. 1978); and Baker v. United States, 417 F. Supp. 471 (W.D. Wash. 1975). Indeed, the failure to conduct an appropriate pre-flight airworthiness inspection is grounds for suspension of an aircraft pilot certificate. Daily v. Bond, 623 F.2d 624 (9th Cir. 1980). The regulations at issue in the instant case are intended to be strictly applied and given the full and broad effect necessary to prevent the operation of airplanes when they are determined by their pilots to be in an unsafe condition.

It is respectfully submitted that to let stand the decision of the court of appeals which disregarded the F.A.A. regulations here at issue would be to drastically undermine the policy of the F.A.A. calling for the insurance of the safe operation of aircraft. If aircraft lessees, such as the petitioners, are viewed to be required under a lease contract either to pay for

an aircraft which is not airworthy[1] or to operate an unsafe aircraft, economic considerations may often require unsafe aircraft operation. The important federal requirements of safe aircraft operation would be required to give way to state contract principles in such cases. This, it is submitted, is not the intent of the federal regulation of air commerce. When a lessee has been provided by the lessor with an aircraft which is not airworthy, according to the aircraft pilot, the federal regulations should be interpreted as establishing that no consideration has been given to the lessee because of the airplane's unsafe condition.

---

[1] This is the reasoning of the district court and the court of appeals. In the petitioners' second reason supporting the grant of a writ of certiorari, the petitioners assert that this is an erroneous interpretation of state law. It is assumed here arguendo.

This, it is submitted, is the only way to fully effectuate the strict requirements of aircraft safety mandated by federal statutes and regulations.

Because the court of appeals gave greater effect to its interpretation of state contract principles than to important Federal Aviation Administration regulations and the federal policies enunciated therein, the petitioners respectfully submit that the court of appeals' decision to affirm the district court's judgment should be reversed.

II

THE DECISION OF THE COURT OF APPEALS THAT NO FAILURE OF CONSIDERATION FROM THE RESPONDENT TO THE PETITIONER OCCURRED UNDER THEIR AIRPLANE LEASE CONTRACT WAS BASED UPON AN INTERPRETATION OF STATE LAW, AS REQUIRED BY THIS HONORABLE COURT UNDER THE PRINCIPLES OF ERIE RAILWAY V. TOMPKINS, 304 U.S. 64 (1938), WHICH INTERPRETATION WAS INCORRECT.

The court of appeals, in passing, rejected the petitioners' argument that there had been a failure of consideration from the respondent which justified the petitioners' refusal to continue payment under the lease contract. It cited one case in support of this conclusion, Transamerica Leasing Corp. v. Van's Realty Co., 91 Idaho 510, 427 P.2d 284 (1969). The petitioners contend that this case is not properly dispositive of the petitioners' failure of consideration claim and that the Idaho Supreme Court would have reasoned differently on the issue. It is thus respectfully submitted that the dictates of the Rules of Decision

Act, 28 U.S.C. § 1652, as interpreted by this Honorable Court in Erie Railway v. Tompkins, 304 U.S. 64 (1938), were not correctly applied by the court of appeals.

The Transamerica case would not be viewed as authority in Idaho beyond its limited fact situation. In that case, the lessor and lessee entered into a transaction in which the lessor would purchase a machine which was selected by the lessee, who also participated in the building of the machine. The transaction was labelled by the Supreme Court of Idaho as a speculative venture. 427 P.2d at 287. No technical study had ever been made of the machine. Id. No one knew whether the machine would work at all, even at the beginning of the lease period. Id. The only role of the lessor in the transaction was to furnish money to buy the machine.

The facts in Transamerica, it is submitted, are readily distinguishable from

those in the petitioners' case. When the petitioners entered into a lease agreement for an airplane, they were not entering into a speculative transaction in which the possible performance capabilities of the bargained-for consideration were in question to all concerned. The petitioners bargained for an airworthy airplane which could be relied upon for use in their business. In the petitioners' case, it was not, as it was in Transamerica, the efforts of the respondent to finance the purchase of an airplane which was the consideration bargained for; rather, it was the airplane itself that was the consideration. When the petitioners' case is so properly viewed, it is contended, the Transamerica case ceases to be relevant. The petitioner contends that the Idaho Supreme Court would apply law on failure of consideration in a way which would require a different result to be reached from that reached by the court of appeals.

The Idaho Supreme Court has decided no case which would control the determination of the instant case. The two closest cases decided by that court are Blinzler v. Andrews, 91 Idaho 215, 485 P.2d 957 (1971), and Huggins v. Green Top Dairy Farms, 75 Idaho 436, 273 P.2d 399 (1954). Both cases support the notion that rescission is proper when one party has materially breached the contract. They thus are consistent with, although not authority in and of themselves, for the proposition that failure of consideration from one party relieves the other of his contractual duties. Thus, other sources should be consulted to determine the law which Idaho would apply to the petitioners' failure of consideration claim. See Wright, Law of Federal Courts 270-71 (1976).

Two highly persuasive authorities which Idaho would likely follow are the Restatement (Second) of Contracts, and

Corbin on Contracts. Corbin defines failure of consideration in the following way:

> In innumerable cases, however, a promise has been declared to be unenforceable because there has been a "failure of the consideration." This does not mean lack of consideration; nor does it often mean that the promise, now unenforceable, was never a valid contract. It does mean, on the other hand, that a performance for which the promisor bargained has not been rendered; in many cases, though not in all, that failure is a good legal excuse for his refusal to perform his own promise, and it may be a good reason for compelling restitution if he has already performed.

1 Corbin on Contracts § 133 at 572 (1963).

The on-point Restatement section states:

> Except as stated in § 265, [dealing with corresponding part performance pairs], it is a condition of each party's remaining duties to render performance to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

Restatement (Second) of Contracts § 262 (Tent. Draft No. 8, 1973); accord, 6 Williston, Contracts § 814.

The petitioners respectfully submit that had the court of appeals relied on such authority that this case would have been decided differently. As stated earlier, the petitioners bargained with the respondent for an airplane which was airworthy. When the condition of the leased airplane deteriorated to a non-airworthy state the entirety of that for which the petitioners had bargained vanished. Since an airworthy airplane was not delivered by the respondent, the duty of the petitioners to continue making rent payments should have been viewed to have been extinguished. It is submitted that this Honorable Court should reverse the judgment of the court of appeals because of its failure to apply the law that the Supreme Court of Idaho would have applied.

III

THE COURT OF APPEALS APPLIED THE PORTION OF FED. R. CIV. P. 52, THAT FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS, TO THE ULTIMATE ISSUE IT WAS TO DECIDE AND THEREBY VIOLATED THE INTERPRETATION WHICH HAS BEEN GIVEN TO THE "CLEARLY ERRONEOUS RULE" BY THE FEDERAL COURTS.

The court of appeals essentially brushed aside all of the petitioners' defenses to the alleged breach of the airplane lease contract when it decided one issue. The issue was whether the petitioners stopped making rent payments under the lease because they could not use the aircraft profitably, or on the other hand, whether they stopped payment because the aircraft was not air-worthy. The court resolved the issue by refusing to reject the district court's holding that the petitioners stopped making payments because they could not use the aircraft profitably. The court of appeals deferred to the district court's judgment

based upon the following language contained in Fed. R. Civ. P. 52(a): "Findings of fact shall not be set aside unless clearly erroneous . . . ." It is respectfully submitted that in so deferring to the district court, the court of appeals improperly applied Fed. R. Civ. P. 52(a) and denied the petitioners a meaningful opportunity for appellate review on their claim that the F.A.A. airworthiness regulations had not been properly considered and applied.

The district court judgment which was deferred to by the court of appeals essentially decided the entire case on appeal. The district court's finding that the petitioners stopped payment under the contract because they could not use the aircraft profitably is merely another way of stating the proposition that the petitioners breached the contract because they refused, without justification, to continue to pay according to its terms. The two propositions are indistinguishable in their meanings and

the court of appeals applied the district court's finding as meaning that the petitioners breached the contract. The petitioners contend that when the "finding" in question of the district court is viewed in light of its real meaning and effect, it is clear that it was not a factual finding but was a holding on the ultimate issue of the case. As such, the petitioners contend that the court of appeals should not have deferred to the district court's judgment under the "clearly erroneous" rule.

The "clearly erroneous" rule has never been held to extend beyond findings of fact or inferences from undisputed facts. See Commissioner v. Duberstein, 363 U.S. 278 (1960); United States v. United States Gypsum Co., 333 U.S. 364 (1948). The rule has never been extended to legal determinations, to determinations involving mixed questions of fact and law, or to determinations of the ultimate question before the court.

> When it comes to conclusions of law and inferences to be drawn therefrom, the appellate court is free to act independently and draw its own legal conclusions and inferences. . . . If this were not so, the appellate court would be stripped of its power of review. Moreover, not all findings labeled as findings of fact are binding on an appellate court. Where a finding designated as a finding of fact is not in reality a finding of fact, but is a conclusion of law or a mixed finding of fact and conclusion of law, it is not binding on the appellate court . . . . Where a finding is of an ultimate fact in the making of which is involved the application of legal principles, it is subject to review.

Cordovan v. Dayton Rubber Co., 290 F.2d 858, 859-60 (6th Cir. 1961)(citations omitted). This Honorable Court has recognized these principles ever since its decisions in Bogardus v. Commissioner, 302 U.S. 34 (1937), and Baumgartner v. United States, 322 U.S. 665 (1944).

A number of lower court decisions

are persuasive examples of why the "clearly erroneous" test was improperly applied in the instant case. Downing v. Williams, 624 F.2d 612 (5th Cir. 1980), is one such example. There, the question was whether the appellate court should apply the "clearly erroneous" rule to a jury determination that an employee had been dismissed from his job "with good cause." The court held that the rule would not properly be applied. It began by noting that the ultimate question in the case was whether the employee's dismissal had violated his first amendment rights. Since the determination of the "good cause" issue would necessarily decide the constitutional issue, the "clearly erroneous" rule was held inapplicable.

> [W]e are not bound by the jury's findings that Dr. Downing [the employee] was dismissed "with good cause." . . . [T]he ultimate question of whether Dr. Downing was fired for reasons that impermissibly abridged his first amendment rights is a question of law for the trial court. . . .

> In this inquiry, there are some factual matters which a jury could decide, for example, the extent of a disruption [the employee was said to have caused]. But any questions of fact which a jury could decide which might relate to the ultimate questions of law are nonetheless subject to careful review by the Court of Appeals which has the power to "conduct an independent review of constitutional claims when necessary."

Id. at 621-22.

The decisions in Joseph Lupowitz Sons, Inc. v. Commissioner, 497 F.2d 862 (3d Cir. 1974), and United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973), are also instructive. Joseph Lupowitz Sons, Inc., supra, was an income tax case in which the issue was whether the "clearly erroneous" rule should apply to the determination of whether a certain money transfer was a loan or a contribution to capital. The clearly erroneous rule was held to be inapplicable. The court observed that the review of basic facts in a district court's decision must

be distinguished from a review of the ultimate issue decided. The latter was held to be the case in Joseph Lupowitz Sons, Inc., and so the finding was reversible just as an issue of law would have been, that is, through full appellate review.

Weingarden, supra, was a tax case also, but at issue was the propriety of a summons issued against the defendant by the I.R.S. According to the applicable law, the propriety of the summons would be determined depending upon the purpose behind its issuance. The district court found that it had been issued solely for the purpose of a criminal investigation and was thus improper. On appeal, the question was whether the clearly erroneous rule should apply to this finding. The court held that it should not. Again, the finding was held to be either a mixed question of law and fact or a determination of ultimate fact which is fully reviewable. Accord, Weisel

v. Singapore Joint Venture, Inc., 602 F.2d 1185 n. 11 (5th Cir. 1979); United States v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978); and Securities and Exchange Commission v. Bausch & Lomb, Inc. 565 F.2d 8 (2d Cir. 1977).

The instant case is very similar to those cited above. When the district court found that the petitioners stopped paying rent installments because they could not use the aircraft profitably, the issue of breach, which is the ultimate issue in the case, had been decided. Merely because the term breach was not explicitly used by the court changes nothing. The district court's determination was entirely dispositive of the case. The petitioners, it is respectfully submitted, should have been afforded full appellate review of the issue of breach. To allow the "clearly erroneous" rule to be construed otherwise would be to allow this exception to vastly diminish

the opportunity for meaningful appellate review.

CONCLUSION

Based on the foregoing, the petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN A. PRING, SR.,
Plaintiff-Appellee,

vs.

CHARLES E. STARR and
SOPHIE J. STARR, et. al.,
Defendants-Appellants.

No. 79-4048
D.C. No. CIV. 77
2025
MEMORANDUM

Submitted — December 10, 1980
Decided — December 12, 1980

Appeal from the United States
District Court for the
District of Idaho
Ray McNichols, Chief District Judge,
Presiding

Before: WRIGHT and FLETCHER, Circuit Judges,
and
PECKHAM,* District Judge

We affirm the judgment in this diversity case. Idaho law governs the rights and obligations of the parties under a contract formed and carried out in that state.

Pring agreed to purchase and lease an aircraft to Starr who agreed to pay a minimum monthly rental for use of the plane, and to provide storage, insurance and operational maintenance.

*Honorable Robert F. Peckham, Chief United States District Judge of the Northern District of California, sitting by designation.

Starr located a Cessna 414 acceptable for his purposes and Pring bought it. The district court found that Starr breached the contract when he stopped making monthly payments on the lease.

Star contends the aircraft was not airworthy, and that there was a failure of consideration relieving him of his obligation to pay.

The district court found that he stopped paying because he could not use the aircraft profitably. That was a factual finding, which we will not disturb unless clearly erroneous.

In a letter to Pring, Starr explained he would make no more payments because the airplane was not profitable and was going to be sold. In light of that letter the Starr's testimony on cross-examination, the factual finding was not clearly erroneous.

Moreover, even if we assume the craft was not airworthy, there was no failure of consideration. Pring furnished the consideration required by the contract when he purchased the airplane selected by Starr. See Transamerica Leasing Corp. v. Van's Realty Co., 91 Idaho 510, 427 P.2d 284, 291 (1969).

AFFIRMED.

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APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF IDAHO

JOHN A. PRING, SR., Plaintiff, vs. CHARLES E. STARR, and SOPHIE J. STARR, husband and wife, and COEUR D'ALENE AIRWAYS, INC., Defendants.	Civil No. 77-2025 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for a bench trial on the merits on Septmeber 18, 1978. Each party was represented by counsel of record. Evidence, both oral and documentary, was received. Post-Trial Briefs were filed and the matter stands submitted for final determination. The Court, being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff is a citizen of the State of Washington; defendants Charles E. Starr and Sophie J. Starr are husband and

wife and are citizens of the State of Idaho; the defendant Coeur d'Alene Airways, Inc., is an Idaho corporation with its principal place of business in the State of Idaho; the amount in controversy exceeds $10,000 over and above interest and costs.

2. Defendants at all times pertinent hereto operated a fixed-base air service operation at an airport at Coeur d'Alene, Idaho. Flight training, aircraft maintenance, and air taxi service was offered to the public. Defendant Charles E. Starr was an experienced aircraft pilot.

3. Defendants desired to obtain the use of a relatively large aircraft for use in the charter air taxi service and to utilize in a proposed non-scheduled air service between Coeur d'Alene and Boise, Idaho.

4. On or about July 28, 1975, the parties hereto entered into a Lease Contract. By the terms of the Contract, plaintiff was

to purchase an acceptable airplane for his use and that of the defendants. Defendants agreed to utilize the aircraft for charter at a rental of $100.00 per hour with a minimum rental of $1,900.00 per month. Defendants were to provide storage, maintenance, and insurance for the aircraft with a pro rata arrangement based on the amount of use of the airplane by the plaintiff.

5. Defendants selected a 7-place Cessna twin-engine aircraft, equipped with deicers, hot prop, pressurized cabin, instrumentation, and like features necessary for charter and non-scheduled airline service. Plaintiff purchased the plane at a cost of $185,000.00 in July, 1975.

6. Defendants took charge of the airplane, and it was utilized by the parties under the Lease.

7. Defendants, with reasonable regularity, made the monthly minimum payments of $1,900.00 for the month of August, 1975,

through May, 1976; a total of ten payments in the total amount of $19,000.00. The last payment was made on June 6, 1976.

8. In October, 1975, defendants reported to plaintiff that certain rivets in the fuselage had become loose. The plane was returned to the manufacturer, or the agent of the manufacturer, and ultimately returned to the defendants, reportedly in safe condition.

9. In January or Feburary, 1976, defendants began the proposed non-scheduled air service from Coeur d'Alene, Idaho, to Boise, Idaho, using the Cessna. After approximately three weeks of trial runs and unscheduled activity it was abandoned for the reason that it proved to be economically unfeasible.

10. By about the month of May, 1976, it was evident to the defendants that they were unable to obtain sufficient income from the use of the Cessna aircraft to meet

the $1,900.00 per month minimum lease payments. They ceased making the payments for this reason.

11. In the fall of 1976, defendants sold their fixed-base operation. Defendant Charles E. Starr was found physically disqualified from flying in the fall of 1976.

12. Defendants claim, and defendant Charles E. Starr testified, that the reason for termination of the Lease Contract by the defendants was the problem with the rivets which he claimed was never properly cured. I find from the evidence that the alleged dangerous condition caused by loose rivets was not the reason for the termination of the lease payments by the defendants.

13. The aircraft was, at all times pertinent hereto, certified to be airworthy by the Federal Aviation Authority.

14. Defendants contended, and offered some evidence to the effect, that they had a contemporary oral agreement with the

plaintiff to the effect that, if the Lease Contract plan did not work out, the Contract would be mutually terminated, the aircraft sold, and the profits, if any, equally divided. Plaintiff specifically denies that any such agreement existed contemporaneously with the Contract or prior to the breach by the defendants. I find that no such oral agreement was entered into by the parties providing for any termination of the lease obligation as claimed by the defendants.

15. On October 19, 1976, plaintiff wrote to the defendants and demanded payment of the delinquent June, July, August, September and November payments under the lease in the sum of $9,500.00, computed as five payments of $1,900.00 each. Defendants raised no objection to this demand, made no response to the letter, and did not make any further payment.

16. On January 6, 1977, plaintiff again wrote to the defendants, and again

demanded payment of delinquent payments for June, 1976, through January, 1977, a total of eight payments of $1,900.00 each for a total of $15,200.00.

17. On January 12, 1977, defendants answered the demand made by plaintiff's letter of January 6, 1977. For the first time, defendants denied owing the delinquent lease payments.

18. In the January 12, 1977, letter, defendants raised the defense of an oral agreement to terminate the lease which the Court has found was not entered into.

19. In April, 1977, this suit was filed by the plaintiff demanding payment of all back lease payments plus the balance of the lease payments for the entire term of the Lease Contract.

20. In July, 1977, plaintiff recovered possession of the Cessna. In order to obtain possession, he had to pay a six-months' hangar storage charge in the sum of $700.00

made by the company which had purchased defendants' business.

21. The Cessna needed repairs and an inspection in order to be airworthy. Plaintiff paid the sum of $3,177.46 for such repairs and inspection, which sums I find to be reasonable for the services performed.

22. Plaintiff paid $150.00 as insurance premiums on the plane during the time defendants had custody and were required to furnish insurance.

23. Plaintiff made a reasonable attempt to find another lease in order to mitigate damages. On or about August 1, 1977, plaintiff leased the aircraft to Felts Field Aviation, Inc. (Felts) at the best terms he could arrange.

24. Plaintiff received $12,084.00 from Felts for such rental through August, 1978. Assuming that future income remains at this level, which the Court finds to be a reasonable inference from the evidence,

plaintiff will receive $17,930.00 additional rental from Felts up to the date when the lease between plaintiff and defendants would expire by its terms.

25. The total minimum rental called for by the lease was a sum of $114,000.00 ($1,900.00 per month for sixty months). Defendants paid under the lease the sum of $19,000.00. Plaintiff has received from Felts the sum of $12,084.00. Plaintiff will likely receive from Felts an additional $17,930.00 over the balance of the five-year lease. The plaintiff has properly expended the following sums: Hangar storage, $700.00; insurance, $150.00; repairs and inspections, $3,177.46.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact I conclude as a matter of law:

1. That the Court has jurisdiction over the parties and the subject matter.

2. That on or about July 28, 1975,

the parties entered into a binding Lease Contract whereby the defendants agreed to pay at the rate of at least $1,900.00 per month for the lease of a Cessna aircraft owned by the plaintiff. This was a total of lease payments over the life of the lease of $114,000.00.

3. That the defendants without legal cause breached the said Contract and refused to pay the lease payments except that the defendants paid the sum of $19,000.00.

4. That no modification of the Lease Contract was entered into by the parties.

5. That in accordance with his legal duty to mitigate damages, plaintiff took possession of the Cessna and leased the same to a third party.

6. That in order to preserve the Cessna and carry out his duty to mitigate damages, plaintiff advanced the sum of $4,027.46, all as set out in the Findings of Fact.

7. That the plaintiff is entitled to damages against the defendants for a sum equal to the unpaid lease payments, together with the expenses necessarily advanced, and less rentals received and to be received from the second lessee.

8. That plaintiff is entitled to have a money judgment against the defendants in the sum of $69,013.46, together with interest thereon from the date hereof at the rate of eight percent (8%) per annum.

Such damages being recapitulated as follows:

Sixty payments of $1,900.00 each	=	$114,000.00
Advances	=	4,027.46
Total		$118,027.46
Less:		
Lease payments by the defendant	=	$ 19.000.00
Payments by Felts	=	12,084.00
Future payments by Felts	=	17,930.00
Total		$ 49,014.00
DAMAGES		$ 69,013.46

9. Plaintiff is entitled to his costs necessarily incurred herein.

RAY McNICHOLS, CHIEF JUDGE
UNITED STATES DISTRICT COURT